CHEW CHENG SANG v. SUMBER BARISAN DEVELOPMENT SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
JOHAN LEE KIEN HOW J
[CIVIL SUIT NO: WA-22NCvC-516-07-2019]
14 FEBRUARY 2024

Abstract – *(i) Section 20 of the Companies Act 1965 provides a safety net for unwitting parties entering into a contract with other parties who have indicated that they are able to do so on behalf of a company. When an individual has portrayed that he has the authority to sign an agreement on behalf of the company by signing it with his name styled as 'director', the individual is estopped under the doctrine of holding out to denounce it. The doctrine of holding out functions as an estoppel when the onus of the person dealing with the person with ostensible authority is discharged by conduct; (ii) Section 43(2) of the Bills of Exchange Act 1949 safeguards a cause of action for the holder of a dishonoured cheque to sue against the drawer. This is a statutory right in the face of the law that entitles the claimant to the money he is owed.*

CONTRACT: *Agreement – Consultancy agreement ('CA') – Non-performance of monetary obligations under letters of undertaking ('LUs') – Claim for debt – Issue of validity of CA and LUs – Whether signatories had authority to sign CA and LUs – Doctrine of holding out – Whether functions as estoppel – Whether irregularity saved by s. 20(1) of Companies Act 1965 – Whether there was involvement of moneylending scheme – Whether dishonoured cheques conferred right on claimant to claim money owed – Bills of Exchange Act 1949, s. 43(2)*

CIVIL PROCEDURE: *Statement of defence – Reamendment – Application for – Seeking to include new paragraph – Whether cogent reasons given for filing amendment at late stage – Whether could cause prejudice – Timely disposal of cases and limitation of costs – Consideration of – Whether application to reamend at close of trial ought to be dismissed*

This was an action ('suit') brought by the plaintiff to recover certain sums of money promised by the first defendant, a company involved in the construction and development sector. In 2011, the plaintiff was one of two directors of the first defendant. The total number of directors increased to five in 2014 (inclusive of plaintiff). The plaintiff and the other four directors entered into a sale of shares agreement ('SSA') to dispose of the plaintiff's shares in the first defendant. However, this second set of shareholders were unable to fulfil the terms of the SSA. Hence, the reigns of the first defendant were handed over to two other individuals including the second defendant. Prior to the change of owners, the first defendant was involved in two

projects ('projects') to develop two properties in Perak known as the Bidor project and the Tapah project. As part of the SSA's terms and conditions, the first defendant was to enter into a consultancy agreement with the plaintiff. The agreement was to employ the plaintiff's expertise and utilise his skills in the property development industry to oversee the completion of the projects. This consultancy agreement ('CA') was entered into by the parties on the same day of the SSA and was signed by one Shukhen Dutt and one Loke Siew Fun on behalf of the first defendant. Both signatories were part of the second set of shareholders of the first defendant. The first defendant, through the CA, had agreed to pay the plaintiff RM500,000 by way of transfer of one unit of a single-storey semi-detached house located within either the Bidor project or the Tapah project. It was agreed that in the event the value of the property was less than RM500,000, the shortfall would be paid in cash. However, the second set of shareholders were unable to fulfil the conditions set out in the CA. After further discussions, the third set of owners took over the management and shareholding of the first defendant. After the transfer of shareholding from the second set to the third set of shareholders, two letters of undertaking ('LUs') were issued by the first defendant under the hand of the third set of shareholders to the plaintiff: (i) the first undertaking letter ('undertaking letter 1') guaranteeing certain payments and the second undertaking letter ('undertaking letter 2') guaranteeing payments to be made in instalments. Under both LUs, a piece of property ('property') was agreed to be transferred to the plaintiff. In the fulfilment of undertaking letter 1, the first defendant issued two dishonoured cheques to the plaintiff, which led to the issuance of undertaking letter 2. A letter of guarantee ('LG') was also issued to the plaintiff under the hand of the second defendant and one Chong Chee Wei ('guarantors'). In this LG, the guarantors then guaranteed that the money owed by the first defendant to the plaintiff in relation to undertaking letter 1 would be paid failing which the guarantors would perform it in their own capacities. Subsequently, the first defendant signed the memorandum of transfer of the property and thereby transferred the proprietorship of the property to the plaintiff. The first defendant had thus fulfilled its obligations concerning the property. Nevertheless, the first and second defendants' monetary obligations under both LUs were not performed which led to this suit. The plaintiff now sought, among others, the shortfall of RM94,350, the repayment for advancement or loan provided of RM50,000 and other figures including the reimbursement due to the transfer of the property. The issues that arose were (i) whether the CA was valid and enforceable and whether the parties have performed their obligations under the CA; (ii) whether the LUs were valid and enforceable upon the defendant or are they void for want of consideration and invalid under the Moneylenders Act 1951; and (iii) whether there were any statutory breaches by the defendant and thus entitled the plaintiff to the claim of moneys owed.

Held (allowing plaintiff's claims):

(1) The defendant sought an application to reamend their statement of defence under O. 20 r. 5 of the Rules of Court 2012 ('ROC'), to include a new paragraph which gives effect to further particularise their defence. Taking into consideration that the defendant did not disclose any cogent reasons to convince the court to allow the last-minute amendment application, and that the plaintiff might be prejudiced by this application, this court held that to allow the defendant's application would mean to allow the plaintiff to also reamend their pleadings, to restart the entire trial, to recall witnesses and to adduce further evidence. Timely disposal of cases and limitation of costs were the primary considerations under the ROC. Hence, the defendant's application to reamend their statement of defence at the close of the trial was dismissed. (paras 26-33)

(2) The issue of validity of the CA stemmed from the defendant's argument that the signatories of the CA were not, at the material time, authorised signatories of the defendant. The plaintiff countered this line of argument by putting forth evidence that the CA was signed willingly by DW2 with the belief that it was executed under his capacity as a director. From the evidence presented, it was clear that DW2 had portrayed to the plaintiff that he had the authority to sign the CA on behalf of the defendant in at least two ways. Firstly, by signing the CA with his name styled as 'director' and secondly, by taking charge of the defendant's project and signing off the work order as 'managing director.' Therefore, the defendant was estopped under the doctrine of holding out to denounce this. The doctrine of holding out functions as an estoppel when the onus of the person dealing with the person with ostensible authority is discharged by conduct. DW2 and Loke Siew Fun had held out or established ostensible or purported authority to the plaintiff and thus the irregularity was saved by s. 20(1) of the Companies Act 1965. (paras 36-53)

(3) Perusing the CA, specifically cls. 1.01 to 1.04, it was apparent that the condition for the completion of the plaintiff's obligations was not tied or subject to the completion of the projects. There was no reason to even suggest that the plaintiff did not fulfil his obligations in the CA. The CA was therefore found to be valid and enforceable. The plaintiff had performed his obligations under the CA. (paras 58-62)

(4) To understand the meaning and background of the LUs, the CA must be read together. Hence, the CA was intrinsically linked to the LUs. Therefore, there was clear consideration by the plaintiff in return of the outstanding payments mentioned in the LUs. The plaintiff offered – and completed – his part of the bargain under the CA and thus was clearly entitled to and was now claiming for the outstanding payments mentioned in the LUs. (para 75)

(5) By issuing the guarantee and cheques aforementioned, the signatories of undertaking letter 1 had acquiesced to its contents. DW2 had admitted that he had been holding out as the director and even managing director of the defendant prior to the issuance of the undertaking letter 1. Accordingly, the defendant was estopped under the doctrine of holding out from denying its purported obligation stated in undertaking letter 1. The defendant was also estopped to denounce its liability by virtue of the issuance of the two cheques which was obviously on admission of its indebtedness to the plaintiff. (para 86)

(6) The difference between undertaking letter 1 and undertaking letter 2 was that on top of the acknowledgment of debt, the defendant undertook to forward the sales and purchase agreement relating to the property and to transfer the title to the plaintiff. All of this was conducted by the defendant and proven through contemporaneous documents. At this point of time, it has been well-established that DW1 was the director of the defendant. Therefore, there was no question as to the authority. The defendant's excuse to denounce undertaking letter 2 was as to the formalities under s. 64 of the Companies Act 2016. However, the defendant did not plead this issue in the statement of defence. It is trite law that parties are bound by pleadings and parties are not allowed to adduce facts and issues which they had not pleaded. Thus, the signatories had ostensible (in the case of undertaking letter 1) or real authority (in the case of undertaking letter 2) to sign and execute the relevant undertakings. (paras 91-94)

(7) The defendant sought to declare the additional RM15,000 in undertaking letter 2 as an interest and the whole process as a moneylending transaction. However, witnesses had corroborated that the additional RM15,000 was a sum that was agreed upon and not interest. There was also a clear trail of work and documentation that led to the whole sum, illustrating that was outstanding payment for work done. Therefore, the Moneylenders Act 1951 was not applicable to LUs. Thus, the LUs were valid and enforceable. (paras 102 & 103)

(8) Section 43(2) of the Bills of Exchange Act 1949 safeguards a cause of action for the holder of a dishonoured cheque, the plaintiff, to sue against the drawer, the defendant. This was a statutory right in the face of the law that entitled the plaintiff to the money he was owed. By issuing the dishonoured cheques to the plaintiff, and in the absence of fraud, the defendant had essentially no right to deny the plaintiff's right to the outstanding payments. The issuance of the cheques was a form of admission of indebtedness. The plaintiff was entitled to the outstanding payments under, at the very least for the sum, written on the second dishonoured cheque. (paras 113-115)

Case(s) referred to:

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 CLJ 19 HC ***(refd)***
Development & Commercial Bank Bhd v. Brimal Sdn Bhd & Anor [1991] 2 CLJ 1514; [1991] 2 CLJ (Rep) 554 HC ***(refd)***
Global Globe Property (Melawati) Sdn Bhd v. Jangka Prestasi Sdn Bhd [2020] 6 CLJ 1 CA ***(refd)***
Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(refd)***
Public Bank Bhd v. Metro Construction Sdn Bhd [1991] 1 CLJ 787; [1991] 3 CLJ (Rep) 479 HC ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
Serangoon Garden Estate Ltd v. Marian Chye [1958] CLJU 77; [1958] 1 LNS 77 ***(refd)***
Usahatek Sdn Bhd v. Asia Insurance (M) Bhd; Palaniappan Sinnapan (Third Party) [2010] CLJU 670; [2010] 1 LNS 670 HC ***(refd)***
Vithal Kumar Jayaraman v. Azman Md Nor [2010] 3 CLJ 332 CA ***(refd)***
Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***
Yee Teck Fah v. Lee Chee Meng [2020] CLJU 847; [2020] 1 LNS 847 HC ***(refd)***

Legislation referred to:

Bills of Exchange Act 1949, ss. 43(2), 48(a)
Companies Act 1965, s. 20(1)
Companies Act 2016, ss. 64, 124, 126, 224, 225
Contracts Act 1950, ss. 10(1), 21
Evidence Act 1950, s. 92
Rules of Court 2012, O. 20 r. 5

For the plaintiff - Tan Wei Shin; M/s Tan Wei Shin
For the defendant - Oh Teik Keng; M/s Oh Teik Keng & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Johan Lee Kien How J:

Introduction

[1] This is an action ("this suit") brought by Mr Chew Cheng Sang ("the plaintiff") to recover certain sum of money promised by Sumber Barisan Development Sdn Bhd ("the first defendant"). The first defendant is a company involved in the construction and development sector. In 2011, the plaintiff was one of the two directors of the first defendant. The total number of directors increased to five in 2014 (inclusive of the plaintiff).

[2] As in the course of business and in life, nothing can be considered constant and permanent. The plaintiff and the other four directors entered into a sales of shares agreement dated 12 December 2014 ("the SSA") to dispose of the plaintiff's shares in the first defendant. However, this second set of shareholders were unable to fulfil the terms of the SSA. Hence, the reigns of the first defendant were handed over to two other individuals including the second defendant.

[3] Prior to the change of owners, the first defendant was involved in two projects (collectively, "the projects") to develop two properties in Perak:

(i) a residential development at Lot 1622, Mukim Bidor, Daerah Batang, Perak ("the Bidor project"); and

(ii) a commercial and residential development at Lot 407, Mukim Batang, Daerah Batang Padang, Perak ("the Tapah project").

[4] These two development projects played pivotal roles in the first defendant's history and become umbilical cords attached to the plaintiff that eventually became the core of the dispute in this suit.

The Dispute

[5] As part of the SSA's terms and conditions, the first defendant was to enter into a consultancy agreement with the plaintiff. The agreement was to employ the plaintiff's expertise and utilise his skills in the property development industry to oversee the completion of the projects. This consultancy agreement ("the CA") was entered into by the parties on the same day of the SSA namely 12 December 2014. It was signed by one Shukhen Dutt and one Loke Siew Fun on behalf of the first defendant. Both signatories were part of the second set of shareholders of the first defendant.

[6] The first defendant through the CA had agreed to pay the plaintiff RM500,000 by way of transfer of one unit of single-storey semi-detached house located within either the Bidor project or the Tapah project. It was agreed that in the event the value of the property is less than RM500,000, the shortfall would be paid in cash.

[7] However, the second set of shareholders were unable to fulfil the conditions set out in the CA. After further discussions, the third set of owners took over the management and shareholding of the first defendant in 2015.

[8] After the transfer of shareholding from the second set to the third set of shareholders, two letters of undertaking (collectively, "LUs") were issued by the first defendant under the hand of the third set of shareholders to the plaintiff:

(i) the first undertaking letter dated 18 June 2015 ("undertaking letter 1") had guaranteed the payment of, among others:

(a) a sum of RM50,000 before 20 July 2015 without interest;

(b) another sum of RM50,000 before 20 August 2015 without interest;

(c) a sum of RM94,350 before 20 November 2015 without interest as contra payment of one semi-detached property; and

(ii) the second undertaking letter dated 11 August 2016 ("undertaking letter 2") had guaranteed payment of, among others:

(a) a sum of RM158,450 calculated from moneys owed in undertaking letter 1 with the breakdown of RM93,450 plus RM50,000 and RM15,000; and

(b) the payments would be paid in four instalments: RM28,450 (on or before 10 September 2016), RM40,000 (on or before 10 October 2016), RM40,000 (on or before 10 November 2016), and RM50,000 (on or before 10 December 2016).

(iii) under both LUs, the transfer of one 3,955 square feet semi-detached property known as Lot No. 18, Jalan Ixora, Taman Ixora, 35400 Tapah, Perak ("the property") was agreed to be the property to be transferred to the plaintiff.

[9] In fulfilment of undertaking letter 1, the first defendant issued two dishonoured cheques to the plaintiff:

(i) one PBB cheque dated 31 December 2015 for RM50,000 which bounced on 5 January 2016; and

(ii) one PBB cheque dated 1 March 2016 for RM94,350 which bounced on 2 March 2016.

[10] It was not disputed that the cheques were dishonoured which then led to the issuance of undertaking letter 2, but it is unclear whether the first defendant was notified of the dishonoured cheques.

[11] A letter of guarantee dated 12 December 2014 ("LG") was also issued to the plaintiff under the hand of the second defendant and one Chong Chee Wei ("the guarantors"). In this LG, the guarantors therein guaranteed that the money owed by the first defendant to the plaintiff in relation to undertaking letter 1 would be paid failing which the guarantors would perform it in their own capacities.

[12] On 9 March 2017, the first defendant signed the memorandum of transfer of the property and thereby transferring the proprietorship of the property to the plaintiff. The first defendant, has, thus, fulfilled its obligations concerning the property.

[13] Nevertheless, the first and second defendants' monetary obligations under both LUs were not performed which led to this suit. The plaintiff now seeks, among others, the shortfall of RM94,350, the repayment for advancement or loan provided of RM50,000 and other figures including the reimbursement due to the transfer of the property.

[14] Before the commencement of the trial, the plaintiff and the second defendant have entered an amicable settlement as far as the case against the second defendant is concerned. Thus, the plaintiff had discontinued the claim against the second defendant. For ease of reference, the term "defendant" will be used to refer to the first defendant only throughout the rest of this judgment.

The Plaintiff's Case

[15] The plaintiff's case to claim the debt from the defendant is premised on the following:

(i) the CA is valid and enforceable;

(ii) the plaintiff has fulfilled his obligations under the CA and thus is entitled to his payment;

(iii) the defendant has only partially completed its obligations under the CA *ie*, transfer of the property and has not completed its monetary obligation payable to the plaintiff;

(iv) the signatories of undertaking letters 1 and 2 were the defendant's authorised signatories and thus possessed the necessary capacity to bind the defendant; and

(v) the dishonouring of two cheques accrues a cause of action for the plaintiff against the defendant to claim the moneys owed.

The Defendant's Case

[16] The defendant puts forward the following defence:

(i) both LUs are void for want of consideration;

(ii) both LUs are void for illegality because the undersigned were not authorised signatories;

(iii) the CA is void for illegality and thus does not bind the defendant; and

(iv) in the absence of a moneylending license by the plaintiff, both LUs are void *ab initio* due to its feature of an interest-bearing loan.

Amendment Of Defence At The Close Of Trial

[17] Immediately before the closing of the defendant's case, the defendant sought an application before me to reamend their statement of defence under O. 20 r. 5 of the Rules of Court 2012. The amendment application, encl. 94, was filed during recess before the continuation of the defendant's re-examination of the final witness, DWS4.

[18] The defendant's amendment application sought to include a new para. 9F which gives effect to further particularise their defence specifically:

(i) that the CA is void and that the plaintiff did not perform his obligations under the CA;

(ii) that the LUs are void for want of consideration, and are illegal as an unauthorised moneylending instrument because they are essentially interest-bearing loans; and

(iii) that the plaintiff had contravened ss. 124, 224, and 225 of the Companies Act 2016.

[19] After the close of the defendant's case and after being brought to my attention of this amendment application, I instructed both parties to file their written submissions on this application.

[20] After hearing the oral submissions, I had decided to dismiss the defendant's amendment application. My reasoning in dismissing the defendant's application to reamend the statement of defence is discussed herein.

[21] In submissions, both parties relied on the decision of Mohd Azmi FJ in the Federal Court case of *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428; [1983] 1 MLJ 213 which lays out factors to determine in order to allow an amendment application:

(i) whether the application is *bona fide*;

(ii) whether prejudice caused to the other side can be compensated by costs; and

(iii) whether the amendment would not in effect turn the suit from one character into a suit of another and inconsistent character.

[22] The defendant argued that upon the plaintiff's objections that the issue about illegality of the CA and the LUs was not pleaded in the amended statement of defence when the defence witnesses claimed that they were not duly authorised signatories, the defendant must amend the statement of defence in order to cure this irregularity and so as to be able to deal with the issue of illegality.

[23] The defendant claimed that the reamendment would not prejudice the plaintiff as it was taken *in verbatim* from the statement of "issues to be tried" which was filed by the plaintiff himself. Thus, the issue is well within the plaintiff's knowledge and therefore has no element of bad faith nor was it an attempt to ambush the plaintiff.

[24] The plaintiff contended that the principles of *Yamaha Motor* (*supra*) are only applicable if the amendment application is filed at an early stage.

[25] To buttress this argument, the plaintiff relied on the decision of Zulkefli Ahmad Makinudin CJM in *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1, where it was ruled that if an amendment is filed at a very late stage, cogent reasons must be given which otherwise would be fatal to the application:

> [26] *It is to be stated here the requirement that a cogent explanation for such a delay must be furnished when making a late application to amend would be clearly in line with pre-trial case management procedures* (introduced in year 2000). The management of cases by the courts prior to the trial is intended to ensure 'just, expeditious and economical disposal' of an action (see O. 34 r. 4(1) of the RHC 1980, now O. 34 r. 1(1) of the RC 2012) and the Practice

A Direction No 2 of 2014 issued by the Chief Judge of High Court in Malaya). *Timely disposal of cases and the limitation of cost are now the primary considerations under the present regime.* (emphasis added)

[26] It is obvious that the plaintiff's submission is focusing on the issue of delay, where no cogent reasons were given to explain such an application to B amend when the trial was almost over. On this ground alone, I should dismiss the application. I find that the defendant did not disclose any cogent reasons to convince me to allow the last-minute amendment application. In *Hong Leong Finance* (*supra*), the amendment application in question was made immediately prior to the trial whereas the application before me was filed C at the very end of the trial. To say that it is the very definition of an application at the eleventh hour is not an understatement.

[27] The defendant argued that the reason the point of illegality was not raised earlier was because it was raised *ad nauseam* by the defendant's own witnesses which were later supported by several documents. Hence, this D would have been the only opportunity to amend and that this court should be given the chance to deliberate on this.

[28] In *Hong Leong Finance* (*supra*), the court faced a similar predicament:

> [27] In our instant case, there had been five case managements since 2011 and there was no indication at all that an amendment application was E contemplated by the defendant. The only explanation given by the defendant in his affidavit for the delay was that he had only discovered that these new issues were not pleaded when preparing for trial. Such an explanation in our view surely cannot be acceptable.

[29] I am thus unable to accept the defendant's reasoning that the issue F arose due to the testimony of the witnesses. The persons cocking the arrow and dictating the direction of questioning in the trial are the advocates themselves. It is untenable that throughout the preparation of the case, a heavy defence such as illegality did not occur to either the litigant or his counsel.

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[30] On the issue of whether this would cause any prejudice, the defendant conceded, and in fact admitted, that the proposed amendments would have the effect of introducing a new defence to the case: illegality. The defendant however attempted to justify this amendment by undisputed evidence in the SSM reports and thus argued that they, had merit and ample justification.

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[31] During oral submission, the defendant's counsel reiterated and conceded that the unpleaded defence of illegality was a result of oversight. The counsel attempted to justify that the defence was not uncalled for, and that the plaintiff is well aware of this fact seeing that it was mentioned in the "issues to be tried". He further reasoned that the plaintiff was already I equipped and had taken cognisant of this line of defence from the defendant and thus could not claim to be prejudiced by the application.

[32] The plaintiff rebutted and averred that they were prejudiced by this application. At such a late point, the plaintiff would not have any chance to recall witnesses or adduce further evidence after the close of trial which impaired the plaintiff's ability to establish its case and to rebut the defendant's allegation. Even if the defendant had no objection for the plaintiff to reopen his case, there would be an inordinate delay and would incur further costs. The plaintiff also premised that to allow such an application is against the judicial trend under the Rules of Court 2012, and thus could not be compensated with costs.

[33] I am in agreement with the plaintiff on this. To allow the defendant's application would mean to allow the plaintiff to also reamend their pleadings, to restart the entire trial, to recall witnesses, and to adduce further evidence. As in the excerpt from *Hong Leong Finance* (*supra*), timely disposal of cases and limitation of costs are the primary considerations under the Rules of Court 2012. Hence, I dismissed the defendant's application to reamend their statement of defence at the close of the trial.

Decision And Findings

[34] I then proceeded with the submissions of the parties for the entire case. After considering the witnesses' statements, notes of proceedings, the pleadings and the submissions and replies, I allow partially the plaintiff's claim. My findings are based on the following three main points for both the main suit and the counterclaim:

(i) whether the CA is valid and enforceable and whether the parties have performed their obligations under the CA;

(ii) whether the LUs are valid and enforceable upon the defendant or are they void for want of consideration and invalid under the Moneylenders Act?

(iii) whether there are any statutory breaches by the defendant and thus entitle the plaintiff to the claim of moneys owed and whether the plaintiff has breached the Companies Act?

[35] I will deal with the issues in turn with my reasonings in deciding partially in favour of the plaintiff.

Whether The CA Is Valid And Enforceable And That The Parties Have Performed Their Obligations Under The CA

[36] The issue of the validity of the CA stems from the defendant's argument that the signatories of the CA were not, at the material time, authorised signatories of the defendant.

[37] The main point of contention was whether at the time of signing of the CA, both DW2 and Loke Siew Fun were authorised as directors to execute the CA on behalf of the defendant.

A Whether DW2 And Loke Siew Fun Possessed Authority To Execute The CA At The Material Time

[38] When the defendant raised this point during the cross-examination of PW4, the plaintiff's counsel raised an objection that this matter was not pleaded. After standing down at the request of the defendant's counsel to B peruse his statement of defence, the defendant's counsel sought to head in another direction but later came to the same question. However, this time, the defendant laid a foundation from the plaintiff's counsel's examination of the witness. This was further objected by the plaintiff's counsel, but it was pointed out that it is listed in the "issues to be tried". Accordingly, I C instructed parties to put the issue to submissions.

[39] The defendant argued that the CA was signed at a time when, according to the records from the Companies Commission, the signatories, DW2 and Loke Siew Fun, were not actually the directors. Therefore, the CA does not fulfil the requirements of s. 64 of the Companies Act 2016 because D the CA was not executed under the company's common seal, nor was it signed by the directors of the defendant. Hence, because of this irregularity, the defendant sought to declare the CA as void for lack of capacity under ss. 10(1) and 21 of the Contracts Act 1950.

E **[40]** The plaintiff counters this line of argument by putting forth evidence that the CA was signed willingly by DW2 with the belief that it was executed under his capacity as a director:

PC Rujuk saksi kepada Bundle B muka surat 15 sehingga 19 ini merupakan consultancy fee agreement antara Sumber Barisan dan Chew Cheng Sang, betul?

F

DWS2 Betul.

PC Secara amnya consultancy agreement ini kamu yang tandatangan betul tak?

DWS2 Betul.

G

PC Kamu yang tandatangan sebagai Pengarah Sumber Barisan, betul?

DWS2 Betul.

[Encl. 111, page 443-444]

H **[41]** This was later corroborated by DW3 who confirmed that both signatories believed that they were signing as directors of the defendant:

PC Saya rujuk kepada m/s 19 bundle B yang bagi pihak Sumber Barisan yang menandatangan Consultancy Agreement ini adalah Shukhen Dutt dan Loke Siew Fun, betul?

I

DWS3 Ya.

PC Pada masa itu mereka tandatangan sebagai Pengarah Sumber Barisan betul?

DWS3 Ya.

[Refer Encl. 11 at page 355]

[42] During oral submissions, the plaintiff further argued that s. 21 of the Contracts Act 1950 only deals with consideration or object of an agreement and does not relate with the capacity of a director to enter into a contract.

[43] In order to answer this question, it is necessary to establish the timeline of events surrounding the appointment of the signatories and the execution of the CA by these signatories.

[44] From the testimonies at trial, the following is the timeline of events:

Date	Event
3 December 2014	DW2 issues work order for the Tapah Project under Defendant's name as Managing Director.
12 December 2014	Execution of the CA. Resignation of Plaintiff from directorship. Execution of the Sales of Shares Agreement.
20 March 2015	Formalisation of appointment of DW2 as director of Defendant under Form 49.
May 2015	PW3 and DW1 signed and agreed to be the directors of the Defendant.
18 June 2015	Issuance of Undertaking Letter 1.
24 June 2015	Resignation of DW2 as director. Formalisation of PW3 and DW1 directorship under Form 49.

[45] Based on the timeline of events, I am with the plaintiff's submission and find that the defendant had misguided themselves by placing too much emphasis on official records *ie*, the Companies Commission records.

[46] This reliance became the defendant's undoing. At the trial, DW2 backtracked and contradicted his own witness testimony when he was cross-examined by the plaintiff's counsel. DW2 testifies that at the time of execution of the CA, he had already styled himself as the defendant's managing director:

S: Bilakah Shukhen Dutt a/l Pankaj Kumar Dutt dan Loke Siew Fun dilantik sebagai Pengarah D1?

J: Menurut Borang 49 D1 bertarikh 20/3/2015, Shukhen Dutt a/l Pankaj Kumar Dutt dilantik sebagai Pengarah D1 pada 20/3/2015. Pada masa itu, Oon Foong Yee dan Chew Cheng Sang masih adalah Pengarah D1 …

[Refer DWS-2, page 4, Q&A 16]

PC Saya sekali lagi katakan kepada kamu bahawa kamu telah mula kerja sebagai pengarah Sumber Barisan seawal 04.12.2014, betul tak?

DWS2 Betul.

PC Di sana kata designation kamu Managing Director, betul?

DWS2 Betul.

PC Maksudnya Pengarah Sumber Barisan, betul tak?

DWS2 Betul.

[Refer Encl. 111, p. 442, lines 6-13]

[47] Even if I am to accept the defendant's contention that DW2 was not a director at the time the CA was executed by virtue of the Companies Commission's records, I find that the doctrine of holding out works against their logic.

[48] The definition of the doctrine of holding out as adopted in Malaysia can be found in the decision of Edgar Joseph Jr SCJ in the case of *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 1 CLJ 19 at p. 22:

> The doctrine of "holding out" sometimes called apparent or ostensible authority, has been said to have been based upon estoppel. *Agency by estoppel arises where one person has so acted by allowing the agent to hold himself out as having authority as to lead another to believe that he has authorised a third person to act on his behalf, and that other, in such belief, enters into transactions with the third persons within the scope of his ostensible authority.* The onus rests on the person dealing with the agent to establish real or ostensible authority. The conduct said to amount to holding out must be proved affirmatively. It is a question of fact in a particular case whether ostensible authority existed for the particular act in respect of which liability is sought to be imposed upon the principal … (emphasis added)

[49] From the decision of *Cheng Hang Guan* above, the doctrine of holding out functions as an estoppel when the onus of the person dealing with the person with ostensible authority is discharged by conduct.

[50] From the evidence presented (including DW2's own admission), it is clear to me that DW2, at the very least, had portrayed to the plaintiff that he has the authority to sign the CA on behalf of the defendant in at least two

ways. Firstly, by signing the CA with his name styled as 'director'. Secondly, by taking charge of the defendant's project and signing off the work order as 'managing director'. Therefore, I find that the defendant is estopped under the doctrine of holding out to denounce this.

[51] To add, s. 20(1) of the Companies Act 1965, further aids to clarify Loke Siew Fun's and DW2's actions under the eyes of the law. The section is reproduced here for convenience:

> (1) **No act or purported act of a company (including the entering into of an agreement by the company** and including any act done on behalf of a company by an officer or agent of the company under any purported authority, whether express or implied, of the company) and no conveyance or transfer of property, whether real or personal, to or by a company **shall be invalid by reason only of the fact that the company was without capacity or power to do the act** or to execute or take the conveyance or transfer. (emphasis added)

[52] In the case of *Public Bank Bhd v. Metro Construction Sdn Bhd* [1991] 1 CLJ 787; [1991] 3 CLJ (Rep) 479, Lim Beng Choon J, following a discussion on the terms 'actual' and 'purported' authority under s. 20(1) decided that a transaction can be saved under the section once authority is established.

[53] Based on the authorities discussed above, I am of the opinion that DW2 and Loke Siew Fun had held out or established ostensible or purported authority to the plaintiff and thus the irregularity is saved by s. 20(1) of the Companies Act 1965.

Whether Parties Have Performed Their Obligations Under The CA

[54] On this issue, the plaintiff maintained that all obligations on the part of the plaintiff namely providing consultancy services to the defendant is completed. However, the defendant only partially performed its obligations by completing the transfer of the property to the plaintiff. The defendant must now perform its monetary obligation under the CA.

[55] On the flip side, the defendant argued during oral submissions that the plaintiff entered into the CA with the defendant under the CA as the liaison between the defendant and land proprietors with regards to any issues and updating the development progress concerning the projects.

[56] The defendant further argued that the CA spelled out the obligations in past and present tenses. This indicates that the consideration under the CA was past consideration. The defendant implored this court to look at the action after the CA was executed. The defendant claimed that there was barely any evidence of any action by the plaintiff. This, the defendant argued, eventually led to the cancellation of both projects and thus, the plaintiff is not entitled to the payment under the CA.

[57] The plaintiff countered this and premised that it had always been the case that the plaintiff was to only provide consultancy services for the projects. In examination-in-chief, it was established that the plaintiff was able to narrate actual work done without reference to documents and was able to provide specific particulars. Also, there was evidence that the work was actually completed, where DW2 and DW3 even confirmed obtaining paperwork relating to the projects.

[58] In my perusal of the CA, specifically cls. 1.01 to 1.04, it is apparent that the condition for the completion of the plaintiff's obligations is not tied or subject to the completion of the projects. In fact, the specific completion point was mentioned in cl. 1.04:

> It is further agreed between the parties hereto that the duties and scope of works of this Consultancy Agreement *shall cease upon the procurement of the Letter from the Pejabat Tanah & Galian Perak confirming the premium payment quantum payable by the Company in respect of the subdivision of the titles.*
>
> (emphasis added)

[59] I find no ambiguity to cl. 1.04. I also find that the answer to the issue is simple: did the defendant receive confirmation for the 'premium payment quantum' from the land authority?

[60] The answer to the issue lies in the testimony of DW3, one of the defendant's directors:

> PC Ini adalah pengesahan premium oleh PTG bagi Projek Bidor, betul? Mungkin biar saya tolong Puan, m/s 66 tengok di title sana.
>
> DWS3 Ya.
>
> PC Jadi, kedua-dua surat tadi, ini 45 okay dan 66 kedua-dua surat ini diperoleh oleh Chew Cheng Sang, betul tak?
>
> DWS3 Ya.
>
> [Refer to Encl. 111, page 360]

[61] From the above confirmation and in compliance with cl. 1.04, I find no reason to even suggest that the plaintiff did not fulfil his obligations in the CA.

[62] On the first issue, I therefore find that the CA is valid and enforceable, and the plaintiff has performed his obligations under the CA.

Whether The LUs Are Valid And Enforceable Upon The Defendant Or Are They Void For Want Of Consideration And Invalid Under The Moneylenders Act?

[63] I will now turn to the most contentious issue. Submissions from both parties were exhausted in length on the LUs and their enforceability in the eyes of the law.

[64] The arguments of both parties revolved around three points: A

(i) whether either undertaking letter 1 or undertaking letter 2 are void for want of consideration;

(ii) whether the signatories have the authority to sign either or both undertaking letter 1 and/or undertaking letter 2; and B

(iii) whether the additional RM15,000 mentioned in undertaking letter 2 is an interest and thus invalidates the document as an illegal moneylending activity.

[65] The main defence of the defendant for this issue was that the parol evidence rule applies to the LUs. The defendant implored this court not to go beyond the four corners of the documents and only to rely on the terms of the documents. To this, the defendant relied on *Usahatek Sdn Bhd v. Asia Insurance (M) Bhd; Palaniappan Sinnapan (Third Party)* [2010] CLJU 670; [2010] 1 LNS 670; [2011] 7 MLJ 1 where Hanipah Farikullah JC (as she then was) quoted the principle of construction of an agreement: C D

> *It is trite law that documents must be construed within its four corners.* This is the decision of the Federal Court in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229; [1979] 1 LNS 119, and the Supreme Court case of *Koh Siak Poh v. Perkayuan OKS Sdn Bhd* [1986] 1 MLJ 238; [1985] CLJ (Rep) 506; [1985] 1 CLJ 174, where it was held that *in a clear and unambiguous document the court should not go beyond any written terms. This court cannot admit these oral testimonies in the light of s. 92 of the Evidence Act and the cases cited.* (emphasis added) E

[66] The plaintiff contended that the Federal Court decision in the case of *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 allows for the court to look beyond the contract. The decision of Gopal Sri Ram FCJ (as he then was) (at p. 296 (CLJ); p. 621 (MLJ)) was quoted: F

> [42] Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. G H

[67] In my view, the defendant has misinterpreted the decision of *Usahatek Sdn Bhd* (*supra*) to mean a different interpretation of the general rule of construction. The parol evidence rule only governs the application of oral, not written, collateral contracts. This can be clearly seen in the many cases concerning the parol evidence rules and s. 92 of the Evidence Act 1950. I

[68] As submitted by the defendant's counsel, the LUs are written contracts, not oral. Thus, the parol evidence rule does not apply to this situation.

[69] Besides, the parties also argued on the issue of consideration of the LUs. The defendant's entire argument on this point was premised on the fact that this court accepted his contention that the parol evidence rule applies to the LUs. As I have discussed in the preceding paragraphs, the defendant's argument failed on this.

[70] The plaintiff, meanwhile, maintains that a court interpreting a private contract is not confined to the four corners of the document by virtue of *Berjaya Times Square* (*supra*).

[71] In reference to the discussion on the parol evidence rule, I find that the quoted decisions of *Berjaya Times Square* and *Usahatek Sdn Bhd* could be read in harmony. Indeed, a contract must be construed by its four corners in terms of construction of meaning, but the court is empowered to look at the factual matrix when determining the background of a private contract especially, when there is ambiguity or when the contract is silent on certain terms.

[72] To my observation, I need not go beyond what was already alluded to in both LUs. In both letters, the first paragraph reads:

> We refer to the above matter and to the Sale of Share Agreement dated 12/12/2014.

[73] Now, under the authority of the decision in *Berjaya Times Square* (*supra*), I can refer beyond the LUs to understand how each of them came to be. To this end, I must refer to the SSA, in particular cl. 2.2(b) which says:

> Upon the finalization of the share transfers of the Company in favour of the Purchasers as per this Agreement, the Company shall
>
> (i) enter into two contract for consultancy services each with CHEW CHENG SANG (hereinafter referred to as "CCS") and the other OON FONG Yee (F) (hereinafter referred to as "OFY") with a fixed lump sum payment worth Ringgit Malaysia Five Hundred Thousand (RM500,000-00) Only each payable by way of the transfer of one unit of single storey Semi Detached House in either the Bidor Project or the Tapah Project upon the issuance of the Certificate of Compliance & Completion by the Architect appointed by the Company for the Projects, whilst any balance unpaid by way of contra units herein shall be payable by way cash consideration by the Company to the aforesaid CCS and OFY respectively upon the finalization of the project accounts; and …

[74] Following the trail of documents, I must also refer to the CA which is the document for the consultancy services stated and referred to in the SSA. As the LUs refer to outstanding payments, I must therefore refer to the cl. 2.1 of the CA that talks about payment:

> In consideration of CCS discharging his duties to the agreement herein, CCS shall be paid in one off lump sum payment peg at RINGGIT MALAYSIA FIVE HUNDRED (RM500,000-00) ONLY which is to be satisfied by way of payment in kind consideration by way of allocation of one unit of single story Semi Detached House developed by the Company located at the Bidor Project or the Tapah Project (hereinafter referred to as "the Said Property") and in the event the value of the Said Property is less than the sum stated aforesaid, then the Company shall pay the remainder balance shortfall by way of cash consideration in single lump sum payment …

[75] Hence, the CA is intrinsically linked to the LUs. In order to understand the meaning and background of the LUs, the CA must be read together. Therefore, I find that there is clear consideration by the plaintiff in return of the outstanding payments, mentioned in the LUs. As already discussed in the sub-issue of obligations under the CA, the plaintiff offered – and completed – his part of the bargain under the CA and thus is clearly entitled to and thus is now claiming for the outstanding payments mentioned in the LUs.

Whether The Signatories Have The Authority To Sign Undertaking Letter 1

[76] The plaintiff premised that PW3's and DW1's signing of undertaking letter 1 constitutes a binding contract between the defendant and the plaintiff. To support this, the plaintiff quoted the famous decision of Chua J at pp. 114 to 115 of *Serangoon Garden Estate Ltd v. Marian Chye* [1958] CLJU 77; [1958] 1 LNS 77; [1959] 1 MLJ 113:

> I think it is quite clear that when a party signs a contract knowing it to be a contract which governs the relations between them, then, to use the words of Denning J in the case of *Curtis v. Chemical Cleaning and Dyeing Co. supra*, "his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation." In *L'Estrange v. F Graucob Ltd* (1934) 2 KB 394. Scrutton L.J. said "When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."

[77] The plaintiff further argues that the issuance of the undertaking letter 1 was a form of clear and unequivocal admission of the defendant of its indebtedness to the plaintiff. For this, the plaintiff relied on the case of *Vithal Kumar Jayaraman v. Azman Md Nor* [2010] 3 CLJ 332, where Ramly Ali JCA (as he then was) mentioned that a document with a clear undertaking to repay amounts to admission of indebtedness.

Date	Event
May 2015	PW3 and DWS1 signed and agreed to be the director of the Defendant.
18 June 2015	Issuance of Undertaking Letter 1 signed by PW3 and DW1.
24 June 2015	Resignation of DW2 as director of the Defendant. Formalisation of PW3 and DW1 directorship under Form 49.
24 July 2015	Issuance of Guarantee Letter by PW3 and DW1.
31 December 2015	Issuance of RM50,000 cheque to Plaintiff.
1 March 2016	Issuance of RM94,350 cheque to Plaintiff.

[78] Meanwhile, the defendant took a different approach and submitted that neither signatory were directors on the date when undertaking letter 1 was signed. Hence, by virtue of s. 64 of the Companies Act 2016, the defendant contends that the signatories are not competent to contract under s. 10(1) of the Contracts Act 1950 and thus rendering undertaking letter 1 void under s. 21 of the Contracts Act 1950.

[79] In my view, the defendant has misguided itself by jumping the gun, and again, putting much reliance on official documents. Again, let us look into the timeline of events around undertaking letter 1.

[80] From the above timeline, it is obvious that the situation is almost identical to our discussion on the CA above. Within a month before the issuance of undertaking letter 1, both signatories, namely PW3 and DW1, have signed director appointment letters. At least one signatory, PW3, stated that he assumed duties immediately as a director of the defendant:

> PC Good afternoon. Just going through a few questions that my learned friend has asked you. My learned asked you before 24.6.2015 he said that you have no involvement in Sumber Barisan and your answered is no. Can you please explain why?
>
> PW3 At me I already signed the directorship and shareholder's form. Then after I signed the form then I immediately run my responsibility as a director.
>
> [Refer Encl. 111, page 86]

[81] Based on the above, there is clear evidence that both signatories portrayed purported authority to the plaintiff and had signed undertaking letter 1. Therefore, again, adopting the discussion earlier on the purported authority of the CA, s. 20(1) of the Companies Act 1965 would easily cure any irregularities to the signatories' authority.

[82] Even if s. 20(1) is unable to come into play, I find that the decision of *Vithal Kumar Jayaraman* (*supra*) is relevant to the discussion. In this Court of Appeal case, the appellant owed the defendant some RM468,500 in the form of a friendly loan. An agreement that forms as a loan agreement was entered between the parties and several other communications from the appellant and the parties indicated that the appellant indeed owed the defendant. Ramly Ali JCA (as he then was) held that these documents form an admission of indebtedness at p. 342, para. 28:

> [28] After reading all the three documents, the court is more than convinced that there was a clear and unequivocal admission by the 1st defendant of his indebtedness to the plaintiff in respect of the claim. The contents of the letters/documents clearly show that the monies in question were loans or borrowings given by the plaintiff to the 1st defendant pursuant to loan agreements with clear undertaking from the 1st defendant to repay the amount taken within the stipulated time. The admission relates to issue of fact *ie*, that the 1st defendant borrowed the amount in question from the plaintiff and thereafter has failed to repay as promised by him. The issue of collateral oral agreement between the parties as raised by the 1st defendant is baseless. The 1st defendant had failed to substantiate the claim to defeat the clear admission as contained in all the relevant documents.

[83] In the case before me, even if the defendant claims that the signatories did not have competent authority, it is to be noted that in this suit, not only the signatories signed the LUs, the signatories of undertaking letter 1 had also signed a guarantee to the plaintiff to fulfil the payments in undertaking letter 1 after their directorship was formalised. This was mentioned by PW3 and corroborated grudgingly by DW1:

> PC Let's move on. After both of you signed this undertaking letter dated 18.6.2015 at page 20 to 21, what else both of you do?
>
> PW3 After that we also prepared a letter of guarantee to ensure that the undertaking dated 18.6.2015 is fulfil.
>
> [Refer Encl. 111, page 45]
>
> PC Perhaps kamu boleh cuba fikirkan bila pertama kali kamu jumpa surat ini? Is either you saw it in the lawyer office, at the Sumber Barisan office of whichever, which one?
>
> DW1 If I'm not mistake when I take over the company, they give us the document to sign.
>
> PC Roughly tempoh?
>
> DW1 2015, June 24. Because Sumber Barisan owed JMI money. So, we were forced to take over when takeover we don't have any documentation.
>
> PC At least 24.6.2015 you've signed letter of guarantee ini?

DW1 Saya tidak pasti.

PC Tapi mukasurat 23 ini ialah signature kamulah, betul?

DW1 Ya.

[Refer Encl. 111, page 282]

[84] As in the principle propounded under the case of *Serangoon Garden Estate Ltd* (*supra*), it is immaterial whether he has read it or not. In the absence of fraud or misrepresentation, neither of which are pleaded in this case, the signatories are bound to the document/agreement of which they had put their signatures on.

[85] Not only that, under the auspicious administration of DW1 and PW3, two cheques were issued to the plaintiff as payment of the sums mentioned under undertaking letter 1 namely RM50,000 and RM94,350. This was not disputed by DW1.

[86] Therefore, by issuing the guarantee and the cheques aforementioned, I find that the signatories of undertaking letter 1 had acquiesced to its contents. Also, as mentioned earlier, DW2 has admitted that he has been holding out as the director and even managing director of the defendant prior to the issuance of undertaking letter 1. Accordingly, the defendant is now estopped under the doctrine of holding out from denying its purported obligation stated in undertaking letter 1. The defendant is also estopped to denounce its liability by virtue of the issuance of the two cheques which is obviously on admission of its indebtedness to the plaintiff.

Whether The Signatories Have Authority To Sign Undertaking Letter 2

[87] In a similar vein as my findings on undertaking letter 1, I will expand the discussion to undertaking letter 2. Unlike undertaking letter 1, only DW1 signed this specific document.

[88] The timeline of undertaking letter 2 is as follows:

Date	Event
8 August 2016	Plaintiff's resignation as director reflected in Form 49.
11 August 2016	Issuance of Undertaking Letter 2 signed by DW1.
17 August 2016	Defendant forwarded individual title for the Property to the Plaintiff.
22 August 2016	PW3 resigned as director of the Defendant.
6 December 2016	Defendant signed Sales and Purchase Agreement with Plaintiff for the Property.
9 March 2017	Defendant signed off the Memorandum of Transfer for the Property in favour of the Plaintiff.

[89] DW1 did not deny that he signed undertaking letter 2:

PC Rujuk kepada mukasurat 24 hingga 25 bundle B. Ini satu surat daripada Sumber Barisan Development Sdn Bhd 11.8.2016. Ini surat kepada Chew Chang Sang yang dipanggil letter of undertaking. Saya nak fokus kepada perenggan 2, sebelum itu mukasurat 25, Chong Chee Wei, ini tandatangan kamu juga?

DWS1 Ya

[Refer Encl. 111, page 287]

[90] However, regarding the signing of the sales and purchase agreement (of the property), DW1 was evasive and opt to not answer either in the affirmative or the negative despite the documentary evidence shown to him. I find that does lend well to the credence of his answer as he had never once disputed that the sales and purchase agreement was fraudulent. He also admitted that during the agreement's timeframe, he was still acting as a director to the defendant.

[91] The difference between undertaking letter 1 and undertaking letter 2 was that on top of the acknowledgment of debt, the defendant undertook to forward the sales and purchase agreement relating to the property and to transfer the title to the plaintiff. All of this was conducted by the defendant and proven through contemporaneous documents.

[92] At this point of time, it has been well-established that DW1 was the director of the defendant. Therefore, there is no question as to authority. However, the defendant's excuse to denounce undertaking letter 2 was as to the formalities under s. 64 of the Companies Act 2016.

[93] On this, I must accept the plaintiff's submission that the defendant did not plead this issue in the statement of defence. It is trite law that parties are bound by pleadings and parties are not allowed to adduce facts and issues which they have not pleaded. For the sake of completeness and to remind parties as to the unshaken rule, I refer to the decision of Ramly Ali FCJ in the case of *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1 at p. 960 (CLJ); p. 17 (MLJ):

> [29] It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (see *State Government of Perak v. Muniandy* [1986] 1 MLJ 490; and *Anuar bin Mat Amin v. Abdullah bin Mohd Zain* [1989] 3 MLJ 313). In *Blay v. Pollard & Morris* [1930] 1 KB 628, Scrutton LJ ruled that: 'Cases must be decided on the issues on the record; and if it is desired to raise other issues there must be pleaded on the record by amendment'.

[94] Thus, my answer to this issue is in the affirmative and it is my finding that the signatories have ostensible (in the case of undertaking letter 1) or real authority (in the case of undertaking letter 2) to sign and execute the relevant undertakings.

[95] The last portion of this issue is on the applicability of the Moneylenders Act to the LUs. I will deal with this briefly as I find that the defendant has failed to substantiate any meaningful evidence to this.

[96] The defendant's argument is that the undertaking letter 2 discloses an additional sum of RM15,000 that is to be paid by the defendant to the plaintiff. The defendant claimed that the plaintiff during cross-examination had admitted to lending money to the defendant and thus, had engaged in illegal moneylending.

[97] The plaintiff's counterargument was that the plaintiff was not cross-examined on the nature of the additional sum. Further, the plaintiff argued that undertaking letter 2 does not possess any necessary elements to come under the ambit of the Moneylenders Act.

[98] For the sake of clarity, the cross-examination of the plaintiff is reproduced here:

DC There is 15,000, the 15,000 is interest on the soft loan, you agree with me?

PSW4 It is not interest; it is agreed repayment.

DC Like admin charge?

PSW4 Not admin charge. It is between us. This is agreed both, agreed repayment.

DC Would you call it compensation?

PSW4 Not compensation, it's agreed we never talked about agreed sum that he is going to pay for me for this loan amount.

DC I suggest to you by whatever you called it either the penalty or the interest charge, you agree with me?

PSW4 No, I don't agree

PC Sorry my lord, I think the word penalty was not pleaded.

DC I suggest that is interest charge.

PSW4 It is agreed payment.

[Refer Encl. 111, page 146]

[99] From the plaintiff's testimony, it is obvious that there is nothing that can be construed as admission from the plaintiff to reflect any engaging in moneylending, much less illegal moneylending. This was in fact corroborated by PW3 in examination-in-chief and cross-examination:

PC Are these two undertaking letters actually money lending arrangement?

PWS3 No.

PC Why?

PWS3 For these undertaking letters we have two parts. One part is consultancy agreement payment and the other part is self-loan money by Sumber to Mr. Chew Cheng Sang and also the amount is agreeing by both parties, I don't see any money lending.

[Refer Encl. 111, page 59]

DC How this 15,000 which did not appear in the first letter which you confirmed just now only three payments outstanding and now the second letter there is additional 15,000. So, my suggestion is this is the interest?

PWS3 No.

[Refer Encl. 111, page 78]

[100] In oral submissions, the plaintiff submitted that undertaking letter 2 cannot fall under the ambit of the Moneylenders Act as it does not possess the characteristics of a loan, or an interest. With respect, I am with the plaintiff on this. To illustrate this, I refer to the case of *Global Globe Property (Melawati) Sdn Bhd v. Jangka Prestasi Sdn Bhd* [2020] 6 CLJ 1; [2020] 6 MLJ 333, where the Court of Appeal provided a clear portrayal of a cloaked illegal moneylending transaction.

[101] In *Global Globe Property*, two sales and purchase agreements were conducted on the same day, by the same solicitor for properties. Throughout the whole transaction from start to end, there were numerous gaps in documentary evidence as to the transactions that were supposed to occur in such an agreement. Normal correspondence such as extension of time were also absent despite the overrunning of time. Simply put, there were alarm bells ringing and suspicion arose at not one, but multitude of irregularities.

[102] That is not the case before me. The defendant sought to declare the additional RM15,000 in undertaking letter 2 as an interest and the whole process as a moneylending transaction. However, witnesses have corroborated that the additional RM15,000 was a sum that was agreed upon and not interest. There was also a clear trail of work and documentation that led to the whole sum, illustrating that there is outstanding payment for work done.

[103] Therefore, I find that the Moneylenders Act is not applicable to LUs. Thus, I find that the LUs are valid and enforceable.

Whether There Are Any Statutory Breaches In Part Of The Defendant And Thus Entitles Plaintiff To The Claim Of Moneys Owed Or Otherwise That The Plaintiff Has Breached The Companies Act?

[104] On this issue, both parties abandoned the issue of breach of the Companies Act 2016, specifically ss. 124, 224 and 225. Therefore, I find that I do not need to entertain that sub-issue.

[105] I will only deal with the dispute surrounding the dishonoured cheques under the Bills of Exchange Act 1949 and whether a statutory breach has occurred.

[106] The plaintiff submitted that those two (dishonoured) cheques were issued by the defendant in an attempt to comply with undertaking letter 1. Both of these two cheques dated 31 December 2015 and 1 March 2016 were dishonoured on 5 January 2016 and 2 March 2016, respectively.

[107] The plaintiff quoted the admission by DW1 that he had issued the cheques with PW3, and they were dishonoured:

PC Jadi, mukasurat 74 ini adalah notis pulangan cek. Semasa 31.12.2015 ataupun sekitar tempoh itulah sekitar Disember 2015 kamu ada keluarkan cek ini kepada Chew Cheng Sang bersama Kok Oon Sern, betul?

DWS1 Ya

PC Dan rujuk kepada mukasurat seterusnya 75. Saya nak fokus dibawah, 5 imej cek. Di bawah sana cek imej Public Bank, cek Sumber Barisan Development bertarikh 1.3.2016 untuk Chew Cheng Sang, betul?

DWS1 Ya.

PC Untuk RM94,350.00, betul?

DWS1 Ya.

…

PC Kalau rujuk kedua-dua surat ini, 74 dan 75 kedua-dua cek ini adalah dikatakan telah bounce, betul tak?

DWS1 Ya.

[Refer Encl. 111, pages 285-286]

[108] On this, the plaintiff referred this court to the case of *Yee Teck Fah v. Lee Chee Meng* [2020] CLJU 847; [2020] 1 LNS 847 where my learned brother Ahmad Fairuz Zainol Abidin J decided that dishonoured cheques are itself a cause of action for the holder against the drawer:

> [22] Once a cheque is dishonoured, the holder of the cheque will have a cause of action against the drawer of the cheque. This is expressly provided in section 43(2) which provides that "Subject to this Act when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorses accrues to the holder, and no presentment for payment is necessary".
>
> [23] A holder of cheque may sue on the cheque under his name. This is provided under section 38(1) which reads "a holder may sue on the bill in his own name".

[109] During oral submissions, the defendant argued that s. 48 of the Bills of Exchange Act 1949 provides that a notice must be given regarding the dishonoured cheques failing which the drawer is discharged of his obligation. A

[110] In rebuttal, the plaintiff argued that s. 48(a) provides that the omission to notice does not prejudice the rights of the holder. Section 48(a) was interpreted as a proviso to s. 48 that guarantees the right of the holder. B

[111] Following that argument, the defendant counter-argued that the plaintiff misinterpreted the section where the word "non-acceptance" denotes that the proviso only applies to promissory notes and cheques. Instead, the word "non-payment" would have been used. The defendant further argued that the plaintiff was free to pursue under any other law except the Bills of Exchange Act 1949. C

[112] I find that both parties have misunderstood the premise of s. 48 and I must correct this before I move on to the crux of the issue. The Bills of Exchange Act 1949 cannot be read in silo. As a statute guiding the use of financial instruments, it must be read together with other financial statutes, such as the Financial Services Act. The requirement to give notice to the defendant does not fall under the obligation of the plaintiff but rather on the financial institution, to the defendant. This can be seen and as decided in the *Development & Commercial Bank Bhd v. Brimal Sdn Bhd & Anor* [1991] 2 CLJ 1514; [1991] 2 CLJ (Rep) 554 by Zakaria Yatim J (as he then was) in the face of the same argument at p. 556: D E

> It is contended by the defendant that no notice of dishonour was given to him by the plaintiff. I think the plaintiff is under no obligation to give the defendant notice of dishonour. **Under s. 48 of the Act, the plaintiff is only required to give notice of dishonour to the drawer of the bill.** (emphasis added) F

It is to be noted that the plaintiff in this *Development & Commercial Bank Bhd*'s case is the financial institution and not the holder. Therefore, it is the duty of the financial institution to issue notice of dishonour to the drawer and not the holder. G

[113] Now, moving on to the main contention. It is rather unfortunate that the defendant did not submit any counterpoints to this issue. Nevertheless, it is my finding that the plaintiff's submission is on point: s. 43(2) of the Bills of Exchange Act 1949 safeguards a cause of action for the holder of a dishonoured cheque, the plaintiff, to sue against the drawer, the defendant. This is a statutory right in the face of the law that entitles the plaintiff to the money he is owed. H

[114] By issuing the dishonoured cheques to the plaintiff, and in the absence of fraud, the defendant has essentially no right to deny the plaintiff's right to the outstanding payments. The issuance of the cheques is a form of admission of indebtedness. I

[115] Therefore, I answer this issue in the affirmative and the plaintiff is entitled to the outstanding payments under, at the very least for the sum, written on the two dishonoured cheques.

Conclusion

[116] After deliberating on the evidence presented and the submissions of counsels for both parties, I find that the law and facts are in favour of the plaintiff.

[117] Despite the vehement objection of the defendant's status of its directors in executing the CA, and the LUs, the conduct of the defendant's directors had shown that the plaintiff has reasonable belief that the signatories at the time of execution of all of the documents in dispute had ostensible or purported authority to execute the same. This manifested in the form of styling of oneself and also in the management of the defendant's affairs. The late formalisation of directorship under Form 49 cannot be allowed to cover the acts of a *de facto* director or authorised officer.

[118] Due to this, the CA and the LUs cannot be held invalid for irregularities under the Companies Act. Section 20 of the Companies Act 1965 provides safety net for unwitting parties entering into a contract with other parties who have indicated that they are able to do so on behalf of a company. Therefore, the CA and the LUs are valid and enforceable.

[119] It is also unreasonable to assume that undertaking letter 2 had proven that the plaintiff had involved in moneylending scheme. There is no indication or evidence to establish this.

[120] Lastly, by issuing the two cheques to the plaintiff, the defendant had essentially put the nail on the proverbial coffin. Dishonoured cheques immediately confer the plaintiff the right to claim his money owed, regardless of the arrangement between the plaintiff and the defendant and whether the earlier two questions are answered in the negative.

[121] For the above reasons, I allow the plaintiff's claims and I dismiss the defendant's counterclaim in total. I award the plaintiff the total sum of RM159,350 to be paid by the defendant:

(i) RM28,450 with 5% p.a interest running from 10 September 2016 until judgment date;

(ii) RM40,000 with 5% p.a interest running from 10 October 2016 until judgment date;

(iii) RM40,000 with 5% p.a interest running from 10 November 2016 until judgment date;

(iv) RM50,000 with 5% p.a interest running from 10 December 2016 until judgment date;

(v) 5% p.a interest on the total sum of RM159,350 from judgment date to final payment; and

(vi) costs (subject to allocatur).

[122] In my order under [121], I have set the end of the period given in the respective CA and LUs as the effective date from which the interest would start running.